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IN THE

Supreme Court of the United States

October Term, 1966

CHAN HING and LAI CHO,

Petitioners,

against

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service for the District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Title 8, Code of Federal Regulations (CFR):

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals was entered on December 9, 1966. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Involved

1. Can the Immigration Service refuse to make a determination on an application for classification as a refugee pursuant to Section 203(a)(7) of the Immigration and Nationality Act of an alien who is not eligible to adjust his status in the United States?

2. Did the Immigration Service abuse its discretion in denying the petitioners' application for a stay of deportation?

3. Are the regulations promulgated by the Attorney General contrary to the statute?

4. Jurisdiction.

Statute Involved

Immigration & Nationality Act of 1952, as amended:

Section 203(a)(7), 8 U.S.C. [1964 ed., Supp. I] §1153(a):

> "(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a) (ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist dominated country (A) that (i) because of persecution or fear of persecution on account of race, religion or political opinion they have fled (I) from any Communist or Communist-dominated

country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term 'general area of the Middle East' means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: Provided, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

Regulation Involved

Title 8, Code of Federal Regulations (CFR).

"§235.9 Conditional entries.

"(a) Countries in which applications may be filed. Pursuant to agreements entered into with the governments of the countries concerned, officers of the Service are authorized to accept applications and to examine the qualifications of applicants for conditional entry under section 203(a)(7) of the Act in Austria, Belgium, France, Germany, Greece, Italy, and Lebanon. Applications for conditional

entry may be filed only by aliens who are physically present within one of the designated countries.

"(b) * * *

"(c) Application. A separate application for conditional entry under section 203(a)(7) of the Act shall be executed and submitted by each applicant on Form I-590 to the officer in charge of the nearest Service office outside the United States. Each applicant under this paragraph shall appear in person before an immigration officer and excepting a child under 14 years of age shall, prior to the adjudication of his application, be interrogated under oath concerning his eligibility for condtional entry into the United States. * * * The approval of an application by an officer in charge outside the United States authorizes the district director at a port of entry to effect the conditional entry of the applicant upon arrival of such port within 4 months after the date of the approval. * * *"

Statement

The petitioners are natives and citizens of China, who entered the United States as crewmen. The petitioner, Chan Hing, arrived in the United States on April 11, 1965; the petitioner, Lai Cho, arrived in the United States on December 11, 1964. They have continuously resided in the United States since their respective entries. Both of the aliens had deportation hearings at which time they were found to be deportable. Their deportation hearings were held in August of 1965. Thereafter, the petitioners were directed to surrender for deportation to Hong Kong on

February 7, 1966. Prior to that date, each of the petitioners filed an application for a stay of deportation and an application for classification as a refugee pursuant to Section 203(a)(7) of the Immigration and Nationality Act. Their applications for stays of deportation were based upon the fact that they were entitled to apply for classification as refugees in the United States since the regulations promulgated by the Attorney General did not permit such applications to be made in Hong Kong, the Country to which they were to be deported; in fact, the applications for classification could only be made in seven countries in the world, all located in Europe.

The Immigration Service notified the petitioners that their applications for stays of deportation were denied since they could not adjust their status in the United States and there is no provision whereby the Immigration Service can rule solely on their applications for classification as refugees.

The petitioners then commenced this action in the United States District Court alleging that they were entitled to apply for classification as refugees in the United States since the regulations promulgated by the Attorney General did not permit such applications to be made in Hong Kong, and that these regulations arbitrarily eliminated them from applying for conditional entry into the United States.

The respondent made a motion for summary judgment dismissing the complaint. The District Court (Levet, D. J.) granted the Government's motion for summary judgment dismissing the complaint. An appeal was taken to the United States Court of Appeals in the Second Circuit

from that order. The Court, recognizing that this case was one of "first impression" of the interpretation of the provisions of the Immigration and Nationality Act amendments of 1965, wrote an extensive opinion.

The Court stated that to grant the relief requested by the petitioners would be harsh medicine and that the proof offered that the Attorney General acted arbitrarily, was not sufficient. It is the writer's opinion that the facts alone speak for themselves, and that the Government acted improperly in failing to set up an office in the Far East, and thus violated the basic intention of the new Immigration Bill, in that it became impossible for aliens of the Yellow race to make application to enter the United States as refugees. What further proof could have been offered? The Court realized, and the opinion indicated, that an unfair result might occur because of the action of the Attorney General, but they felt that to stay the deportation of the petitioners was not the proper remedy. They also stated that they could not direct the Attorney General to open up offices for the processing of these applications even though there are American Consuls in Hong Kong and in other countries in the Far East. The relief which they stated they were powerless to grant was the relief that these petitioners requested and the practical solution to the problem.

Reasons for Granting the Writ

The decision below raises a number of important questions affecting the rights of alien refugees in the United States and outside of the United States; and also concerns

the scope of jurisdiction that the Court of Appeals has under Section 106 of the Immigration and Nationality Act.

I

This case involves only two aliens in the United States. However, there are many aliens in similar situations in the United States who have already sued the Immigration Service in other courts. In the Second Circuit there are approximately three hundred pending cases awaiting the outcome of this action. Aliens feeling aggrieved by the discriminatory practice of the Immigration Service have commenced over seventy actions in the Circuit Court of Appeals in Philadelphia. There are probably thousands of other aliens similarly affected without counting aliens who are not present in the United States who are precluded from making applications pursuant to Section 203(a)(7) of the Immigration and Nationality Act, outside of the United States. This figure is incalculable.

II

In October of 1965 a new Immigration Bill was passed which, for the first time, included a permanent plan for the admission to the United States of refugees. This section permits conditional entries into the United States for

> "aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist dominated country, (A) that (i) because of persecution or fear of per-

> secution on account of race, religion, or political opinion they have fled (1) from any Communist or Communist-dominated country or area, or * * *
>
> "are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and are not nationals of the countries or areas in which their application for conditional entry is made."

The respondent has interpreted this statute to mean that an application for classification cannot be made in the United States even though the statute does not state that the United States is excluded as a country in which this application can be made. It is the position of the petitioners that since they are refugees who fled from a Communist country, to wit: the Mainland of China, and they are not nationals or citizens of the country in which their application is being made, that their application can be made in the United States. They are not claiming that their status can be adjusted here since they have not been residents of the United States for two years. What they do say, however, is that the classification determination can and should be made in the United States since there are many Immigration and Naturalization Service officers in this country.

When Congress passed this legislation it was part of a broad base amendment to the Immigration and Nationality Act and the first such broad base amendment since 1952. The purpose of the Bill was to eliminate the discriminatory aspects of the national origin quota system. Prior to the enactment of the new Immigration Bill, cer-

tain countries were given favorable treatment by the Congress and minority groups and races were discriminated against. It appears that although Congress wished to eliminate the discrimination against persons of the yellow race, that the enforcement officers and administrative officials by regulation, acted contrary to the intention of Congress.

An application for classification as a refugee merely makes available to a person a visa number which would permit his entry into the United States. It does not make him a permanent resident, but is very similar to a petition which also grants to an alien a certain immigration status. If there is no number available to this person, his entry would not be effected until such time as a quota number became available to him.

The Immigration Service in the United States rules on all petitions under the other six subdivisions of Section 203. All these determinations are made in the United States. Under Section 203(a)(3), an alien in a foreign country who wishes to apply for entry into the United States on the basis of his profession, makes an application at the American Consul in the country in which he resides, which is also ruled upon by the Immigration Service in the United States. A person in the United States who cannot adjust his immigration status here and must leave to get a visa, would also have a petition on his behalf ruled upon in the United States.

In the instant case, the Immigration Service has ruled that these applications cannot be made in the United States

if an alien cannot adjust here. Nowhere in the statute is the United States excluded as a country where an application for any of the benefits of Section 203 can be made. It is the writer's belief that when the Congress excluded any Communist or Communist-dominated country as an area where an application for the benefits of Section 203 (a)(7) could not be made, it was for the sole purpose of excluding applications in those countries and those countries only. By the very nature of the application, such an application could not be permitted to be made in a country which is Communist-dominated. This particular section of the law is beneficial in nature to aliens and should be given a very liberal construction.

The District Director's position is that he does not have the authority to rule on this application. However, the District Director, pursuant to regulations in effect now, does rule on applications for classification as refugees in cases where aliens are eligible to adjust their status in the United States. In fact, the District Director is the only person who can rule on an application pursuant to Section 203(a)(7) in the United States. The approval by the District Director of an application made pursuant to Section 203(a)(7) does not necessarily mean that an alien will become a permanent resident in the United States. He still must make an application pursuant to Section 245 of the Immigration and Nationality Act. Since the District Director does not rule on all Section 245 applications, conceivably a person's application for adjustment of status could be denied, and then he would have to leave the United States and apply for admission from outside the

United States. This would also be the procedure followed where an alien was granted a preference status under all the other six subdivisions of Section 203. Thus, we can see that the District Director would be making a determination on a 203(a)(7) application for an alien who did not adjust his status in the United States.

This is all that the petitioners ask, that the respondent make a determination classifying them as refugees. Then they will leave the country to obtain readmission to the United States as conditional entrants.

The administrative officials have placed another barrier in front of the petitioners because, by regulation they have limited the number of countries where these applications can be made. They have named only seven countries where these applications can be made. Significantly, all of these countries are in Europe, to wit: Austria, Belgium, France, Germany, Greece, Italy and Lebanon. It is also a fact that applications can only be filed by aliens who are physically present in one of the designated countries. The petitioners, and many other aliens similarly situated, both inside and outside the United States, are successfully thwarted. Most refugees do not have travel documents and, therefore, it would be impossible for the petitioners and others to obtain admission to any of the designated countries. It was not the intent of Congress to prohibit refugees from the Far East to make these applications. There is no justification, legally or otherwise, for the failure of the Immigration Service to accept these applications at some office in the Far East. This Court has the power to direct the Attorney General to change his regu-

lations to conform to the statute and not make this a European Refugee Act.

Prior to the enactment of this Bill, the Immigration Service paroled in many refugees from Hong Kong with, apparently, no problems in foreign relations with the Government in Hong Kong. Why they have not established an office in Hong Kong now is inexplainable.

Unless the law is not to be read as it was enacted, but is to be modified by the implied addition of the word "European" before "Communist or Communist-dominated country or area", it is very hard to believe that a law whose prime purpose was to abolish the discriminatory national origin quota system provisions, could have been meant to perpetuate discrimination in this manner.

The law must, therefore, be read as it was written and applied to refugees from all over the world.

The petitioners cannot make an application for classification as refugees in Hong Kong. They are eligible to do so here since there are Immigration Officers in the United States who can adjudicate such applications. The petitioners would be irreparably injured if they were forced to depart from the United States at this time. They are not asking for a permanent stay or for adjustment of status. In fact, they have stated in their applications for stays of deportation that they will depart from the United States upon the adjudication of their applications for classification as refugees. If they are deported to Hong Kong now, they would not be able to travel to any one of the seven countries in Europe where offices are presently set up for

refugees to apply. This decision is unjust, unreasonable, arbitrary, capricious, and an abuse of administrative discretion.

III

In 1961 Section 106(a), 8 U.S.C. Section 1105 was enacted by the Congress granting the Court of Appeals original jurisdiction over certain immigration matters. Since that time, the exact scope of the judicial review bill has created a muddy situation. It has been a difficult section for judges and lawyers alike (See opinion below).

Although the question of jurisdiction was not raised by the respondent in this case the Court did make much of it in their opinion, and in their opinion they spoke about the different determinations made by the different Circuit Courts. The Seventh Circuit has taken a different view from that of the Second Circuit and found that the Court of Appeals has exclusive jurisdiction over all immigration matters. (See *Roumeliotis* v. *I. N. S.*, 304 F. 2d 453, cert. denied, 371 U. S. 921 (1962); *Skiftos* v. *I. N. S.*, 332 F. 2d 203 (1964); *Malone* v. *I. N. S.*, 355 F. 2d 533 (1966).

In addition to the above conflicts, in cases involving the same questions of law and procedure as involved herein, different conclusions were reached by two judges in the District Court of Newark, New Jersey.

In the case of *Lam Ying Kwan, et al.* v. *Rinaldi,* Civ. No. 483-66, Judge Reynier J. Wortendyke, Jr. ruled that where the plaintiff asks for a stay of deportation only and not for discretionary relief, there, too, the Court of Appeals has exclusive jurisdiction over these matters.

An opposite conclusion was reached by Judge Coolahan in the same court, in the case of *Cheng Ho Mui* v. *Rinaldi*, Civ. No. 368-66. In an extensive opinion on the same law and similar facts as in the *Lam Ying Kwan* case, the Court found that the Court of Appeals did not have exclusive jurisdiction over all immigration matters, but only those in relation to Section 242(b) proceedings involving final orders of deportation. There are cross appeals pending in these matters before the United States Court of Appeals for the Third Circuit. No decision has as yet been made in these matters. With the substantial conflict existing throughout the country with reference to the jurisdiction of immigration matters, it is imperative that the Supreme Court grant certiorari in this case so that the matter can be clarified.

CONCLUSION

Wherefore, in consideration of the magnitude of the questions presented, and in the interest of justice, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit.

Dated: New York,
February 3, 1967.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

Before:

FRIENDLY, SMITH and FEINBERG,

Circuit Judges.

FRIENDLY, *Circuit Judge*:

These cases present questions, of first impression for us, of the interpretation of the provisions of the Immigration and Nationality Act Amendments of 1965, 79 Stat. 911, 912-13, according certain refugees preferences for lawful admission.

I.

The 1965 statute had "as its primary objective the abolishment of the national origins quota system for the allocation of immigrant visas and the substitution of a new system of allocation based on a system of preferences which extends priorities in the issuance of immigrant visas to close relatives of U. S. citizens and aliens lawfully admitted for permanent residence, to aliens who are members of the professions, arts, or sciences, and to skilled or unskilled alien laborers who are needed in the United States, and to certain refugees". S. Rep. No. 748, 89th Cong., 1st Sess. (1965), in 1965 U. S. Code Cong. & Adm. News 3329-30. Section 201(a) as amended now provides that, subject to exceptions not here material, "the number of aliens who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence" shall not exceed 170,000 in any fiscal year. Section 203 lists seven

categories of aliens subject to these numerical limitations who are entitled to preferences. The first six of these, entitled in the aggregate to 94% of the 170,000 total, are to receive visas from United States consular representatives abroad. Section 203(a)(7) dealing with refugees, with which we are here concerned, establishes a different procedure for the remaining 6%, or 10,200 per year. It prescribes that "Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe . . . to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country" that they come within the statutory definition of refugee, "Provided, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status".

The further handling of an alien who conditionally entered under §203(a)(7) was prescribed in §203(g) and (h). After two years presence, if his conditional entry has not been terminated by the Attorney General and he has not established permanent residence, he must return to the INS for inspection and examination and is dealt with as any other qualified immigrant except that he is excused from the possession of documents required by §212(a)(20). The 1965 Act made only unimportant amendments to §245,

the provision of the Immigration and Nationality Act dealing generally with the adjustment of status of a nonimmigrant to that of a person admitted for permanent residence. Subsection (a) provides:

> "(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved."

Subsection (b) directs that upon the approval of an application for adjustment under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence and the Secretary of State shall reduce by one the number of preference or nonpreferenc visas authorized by §203(a) "within the class to which the alien is chargeable, for the fiscal year then current".

The Attorney General issued revised regulations to implement §203(a)(7). Those pertinent to conditional entry are 8 C. F. R. §235.9(a) and (c), 31 F. R. 5118 (1966):

> "§235.9 Conditional entries.
>
> "(a) *Countries in which applications may be filed.* Pursuant to agreements entered into with the gov-

> ernments of the countries concerned, officers of the Service are authorized to accept applications and to examine the qualifications of applicants for conditional entry under section 203(a)(7) of the Act, in Austria, Belgium, France, Germany, Greece, Italy, and Lebanon. Applications for conditional entry may be filed only by aliens who are physically present within one of the designated countries.
>
> "(b) • • •
>
> "(c) *Application.* A separate application for conditional entry under section 203(a)(7) of the Act shall be executed and submitted by each applicant on Form 1-590 to the officer in charge of the nearest Service office outside the United States. Each applicant under this paragraph shall appear in person before an immigration officer and excepting a child under 14 years of age shall, prior to the adjudication of his application, be interrogated under oath concerning his eligibility for conditional entry into the United States. • • • The approval of an application by an officer in charge outside the United States authorizes the district director at a port of entry to effect the conditional entry of the applicant upon arrival at such port within 4 months after the date of the approval. • • •"

Those relevant to the adjustment of status proviso are a portion of 8 C. F. R. §245.1(d), 31 F. R. 535 (1966):

> "(d) *Immediate relatives under section 201(b) and preference aliens under section 203(a)(1) through 203(a)(7).*
>
> "• • • An alien who claims preference status under the proviso to section 203(a)(7) of the Act

> is not eligible for the benefits of section 245 of the Act and as provided in §245.4, unless the District Director has approved the alien's Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act."

and §245.4, 31 F. R. 536 (1966:

> "§245.4 *Adjustment of status under the proviso to section 203(a)(7) of the Act.*
>
> "The provisions of section 245 of the Act and this part shall govern the adjustment of status provided for in the proviso to section 203(a)(7) of the Act. Processing of applications for adjustment under the proviso to section 203(a)(7) and this section shall be initiated in each district in the chronological order in which the applicants last arrived in the United States. An alien who claims he is entitled to a preference status pursuant to the proviso to section 203(a)(7) of the Act shall execute and attach to his application for adjustment of status Form I-590A, Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the district director; no appeal shall lie from his determination." [31 F. R. 536, January 15, 1966].

II.

Tai Mui had last entered the United States as a crewman on July 31, 1961. He was ordered to be deported to Hong Kong and was scheduled to exercise his privilege of

voluntary departure on or before November 1, 1965. After failing to depart and being directed to surrender for deportation, he applied to the New York District Director for a stay of deportation under 8 C. F. R. §243.4 in order to prosecute an application for adjustment of status under the amended act. The Director denied the application on the basis that §245 of the Act and 8 C. F. R. §245.1 rendered a crewman ineligible to avail himself of the proviso to §203(a)(7) as a preliminary step to adjusting his status. Tai Mui thereupon sued the District Director in the District Court for the Southern District of New York for a judgment declaring that his being a crewman did not deprive him of the benefits of the proviso to §203(a)(7), that the regulations making him ineligible for such relief on that basis are void, and that a stay of deportation should be granted pending final determination of an application for adjustment of status pursuant to such declaration. Holding that the district court was not deprived of jurisdiction by §106(a) of the Immigration and Nationality Act vesting the courts of appeals with exclusive jurisdiction for review "of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act," Judge Levet sustained the District Director on the merits and granted summary judgment dismissing the complaint, from which Tai Mui appeals.

Chan Hing and Lai Cho, also crewmen, were ordered to be deported to Hong Kong and were given until October 1965 to effect voluntary departure. Having been com-

manded to surrender for deportation, they applied to the New York District Director for a stay of deportation until their applications for refugee classification under §203(a)(7) were adjudicated. Admittedly they did not qualify under the two-year requirement of the proviso, since Lai Cho's last entry was on December 11, 1964, and Chan Hings' on April 11, 1965. They contended that, nevertheless, they would be entitled to conditional entry if they could satisfy an INS officer in the United States, concededly a "non-Communist or non-Communist-dominated country," of their refugee status, and that they could then proceed to some other country from which they would enter the United States; or, if his contention should not be accepted, that the Attorney General abused his discretion by failing to place officers of the INS in some country in the Far East where Chinese would stand a better chance of gaining temporary admission for the purpose of making an application. When the District Director denied their applications, they too sued in the District Court for the Southern District of New York for a declaratory judgment of the invalidity of the regulations and their entitlement to a stay. In their case also Judge Levet held the district court had jurisdiction but dismissed the complaint on the merits, and they appeal.

Woo Cheng Hwa entered the United States as a crewman in June 1963 and was ordered in 1965 to be deported to the Republic of China on Taiwan, being given until April 1, 1966 to depart voluntarily. Having been directed

to surrender for deportation, he moved to reopen the deportation proceedings to adjust his status to that of a permanent resident, contending that he was entitled to this relief by reason of the proviso to §203(a)(7) despite his lack of the refugee classification approved by the District Director required by 8 C. F. R. §245.1(d). Denial by a Special Inquiry Officer and dismissal of his appeal by the Board of Immigration Appeals followed in short order. He here seeks review under §106(a).

III.

We must first consider whether the District Court had power to entertain the declaratory judgment actions brought by Tai Mui and by Chan Hing and Lai Cho. The Government concedes it had jurisdiction over the latter but denies it had this in the former, although believing the initial handling of both types of cases by the district court to be preferable from an administrative standpoint.

We readily agree that the District court had jurisdiction over the action brought against the District Director by Chan Hing and Lai Cho. The statute makes the jurisdiction of the courts of appeals exclusive only as regards "the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242 (b) of this Act." The action did not challenge the deportation orders, and the District Director's refusals of stays under 8 C. F. R. §243.4, which are all it did challenge, were

not made pursuant to administrative proceedings under §242(b). Jurisdiction of the District court is in no way foreclosed by the construction given the statute in *Foti* v. *INS,* 375 U. S. 217 (1963). The Supreme Court there decided that the statutory language covered "a denial of discretionary relief, made during the same proceedings in which deportability is determined, which effectively terminates the proceeding," 375 U. S. at 224, a view reinforced by the consideration that "the administrative discretion to grant a suspension of deportation has historically been consistently exercised as an integral part of the proceedings which have led to the issuance of a final deportation order, and discretionary relief, if sought, must be requested prior to or during the deportation hearing," 375 U. S. at 223, all under §242(b) to which the statute vesting exclusive jurisdiction in the courts of appeals expressly refers. Neither is district court jurisdiction precluded by the later *per curiam* in *Giova* v. *Rosenberg,* 379 U. S. 18 (1964), settling in the affirmative what the Court had characterized in *Foti* as the "somewhat different" question "whether §106(a) extends the exclusive jurisdiction of the Courts of Appeals to include review of orders refusing to reopen deportation proceedings." 375 U. S. at 232. Examination of the record in that case shows that the Board of Immigration Appeals had entertained Giova's motion to reopen the deportation proceeding to grant him a waiver of a ground of excludability provided in §212(g) of the Immigration and Nationality Act or in the alternative for suspension of deportation under §244; its denial of the motion was thus a part of the deportation proceeding itself. *Foti*

and *Giova* do not place within the scope of §106 determinations, such as the one involved here, which do not attack the deportation order itself but instead seek relief not inconsistent with it. Chan Hing and Lai Cho have made no motions to reopen their deportation proceedings and there was no basis on which they could have done so. Rather, their objective was to obtain "conditional entry" which would allow them to depart from the United States, hopefully to some nearby country, with the assurance that they could immediately make lawful entry or, failing that, to be allowed to remain here until the INS opened an office to handle conditional entry applications at some country in the Orient to which they would voluntarily depart.

The Supreme Court' decisions do not demand or even justify our recasting §106(a) so as to give the courts of appeals exclusive jurisdiction over all orders made by immigration officers which might affect the deportation of aliens, subject only to the recognized exception for habeas corpus; if Congress had wanted to go that far, presumably it would have known how to say so. We recognize that the Seventh Circuit has taken or at least come close to taking this position, see *Roumeliotis* v. *INS*, 304 F. 2d 453, cert. denied, 371 U. S. 921 (1962) [denial of first preference visa and stay of deportation]; *Skiftos* v. *INS*, 332 F. 2d 203 (1964) [denial of first preference visa]; *Melone* v. *INS*, 355 F. 2d 533 (1966) [denial of stay of deportation in order to visit brother confined in mental hospital], and we appreciate that such a view has the merit of avoiding sterile jurisdictional controversy. But we do not feel war-

ranted in going so far beyond the words that Congress used; indeed, we are already committed against any such broad position. *Lam Tat Sin* v. *Esperdy*, 227 F. Supp. 482, 484 & n. 2 (S. D. N. Y.), aff'd without discussion of the point, 334 F. 2d 999 (2 Cir.), cert. denied, 379 U. S. 901 (1964). See also *Samala* v. *INS*, 336 F. 2d 7, 12-13 (5 Cir. 1964); *Mendez* v. *Major*, 340 F. 2d 128 (8 Cir. 1965). On the precise point here at issue we follow Judge Coolahan's convincing opinion in *Cheng Ho Mui and Pun Yi Pan* v. *Rinaldi*, Civ. No. 368-66, D. N. J. (1966).

Although these same considerations would seem on their face to settle the jurisdictional issue in Tai Mui's action since he also has never moved to reopen the deportation order or conducted any proceedings under §242(b), the Government says his case is different because he ought to have followed that route, as Woo Cheng Hwa did.[1] It contends he should have moved to reopen the deportation proceeding for an adjustment of his status despite the Attorney General's regulations, binding upon the Special Inquiry Office and the Board of Immigration Appeals,[2] which declare ineligible for adjustment of status an alien

[1] 8 C. F. R. §245.2 provides that an application by an alien for adjustment of status "after he has been served with an order to show cause or warrant of arrest shall be made and considered only in proceedings under Part 242 of this chapter".

[2] Since the Board exists only by virtue of the Attorney General's regulations, 8 C. F. R. Part 3, it naturally regards itself as bound by them in all respects and will not consider challenges to their validity. *Matter of Tzimas*, 10 I. & N. Dec. 101 (1962); see Gordon and Rosenfield, Immigration Law and Procedure §1.10 at 1-50, 1-59 (1966).

lacking a refugee classification approved by the District Director whose determination is expressly immunized from review, and the consequent futility of such a motion at the administrative level.

While the jurisdictional question in Tai Mui's case is much closer than in Chan Hing's and Lai Cho's, the Govment's contention would take us too far from the statutory language and purpose, and would make the statute something of a trap. Faced with a regulation which barred an application for reopening the deportation order to adjust status in the absence of a classification approved by the District Director and with a refusal by the latter not subject to administrative appeal, Tai Mui's lawyer did what most attorneys would have regarded as the natural and sensible thing to do; he attempted to remove the roadblock by obtaining a court order that the District Director must consider Tai Mui's application on its merits and without regard to his being a crewman, just as if Tai Mui had sought to regularize status before becoming subject to an order of deportation. Reading 8 C. F. R. §245.2 in the context of the other provisions applicable in this situation, especially 8 C. F. R. §§245.1(d), 245.4, we hold that Tai Mui was not required to go through the motions of requesting to be heard by a Special Inquiry Officer and then appealing to the Board of Immigration Appeals, but was entitled to challenge the District Director's administratively unreviewable refusal in the district court. A different case would be presented if the Attorney General were to place determinations pursuant to the proviso of

§203(a)(7) under the aegis of Special Inquiry Officers with appeals to the Board of Immigration Appeals, see *Foti* v. *INS*, *supra*, 375 U. S. at 230 n. 16.[3]

IV.

The substantive question raised by Tai Mui's appeal and Woo Cheng Hwa's petition fo rreview is whether the proviso to §203(a)(7) permitting up to 5100 visas a year to "be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status" incorporates the limitation of §245 making adjustment of status thereunder unavailable to an alien crewman, or—perhaps more accurately—whether the Attorney General by regulation may so provide. We answer in the affirmative.

While the proviso would have been clearer if language such as "eligible for adjustment of status under the provisions of this Act," had been inserted after "aliens," we are satisfied Congress intended to accord the preference only to aliens who were entitled to have their status ad-

[3] These cases point up the desirability of Congress' clarifying this needlessly murky piece of legislation and rescuing lawyers and judges from the fruitless jurisdictional disputes that will continue to plague them until it does, as the writer predicted some years ago. The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't, 63 Col. L. Rev. 787, 795-96 (1963). Such legislation could well be preceded by an inquiry whether the 1961 Act is producing the expedition that was contemplated.

justed under existing law rather than to direct the Attorney General to create by regulation a new category for the adjustment of the status of other aliens. In this way Congress excluded from the preference, so far as concerns those who could not qualify under some section other than §245, aliens who had entered illegally and alien crewmen, a group it had characterized as guilty of "frequent abuses of the immigration laws." H. R. Rep. No. 2088, 86th Cong. 2d Sess., 2 (1960). That the same 1965 act which included §203(a)(7) amended §244 to eliminate the ban on alien chewmen adjusting their status under the far more stringent residence and other requirements of that section while leaving intact the corresponding exclusion in §245, works against Tai Mui and Woo Cheng Hwa rather than for them. The Senate Committee, in recommending the change in §244, carefully said it felt "no distinction should be made in the treatment of aliens because of their manner of entry where they meet the other conditions which would qualify them for that form of discretionary relief." S. Rep. No. 748, 89th Cong. 1st Sess. (1965), in 1965 U. S. Code Cong. & Adm. News 3328, 3339. Moreover, the portion of the Senate Report dealing with §203(a)(7), after explaining that the proviso permits 5100 of the numbers authorized for refugees to "be used in lieu of conditional entries to adjust the status of refugees who have been physically present in the United States for 2 years," went on to say, "It is contemplated that such adjustments will be made under section 245 of the Immigration and Nationality Act." *Id.* at 3341. Although such a

gloss is less compelling than if it had been made in connection with a Senate amendment or were a statement in the reports of both houses or of a conference committee, it is entitled to weight nevertheless, see *Utah Junk Co.* v. *Porter,* 328 U. S. 39, 42-43 (1946)—surely as much as floor discussion in one house of an earlier Congress, see *Foti* v. *INS, supra,* 375 U. S. at 223-24. Reliance on such an expression is not "an attempted addition to the statute of something which is not there," *C. I. R.* v. *Acker,* 361 U. S. 87, 93-94 (1959); with §203(a)(7) susceptible of either of two constructions, the Senate Report confirms that the members of one house of Congress who were most knowledgeable on the subject and the others who read their report considered the bill to have the meaning we would have thought the more likely in any event. The construction urged by the Government leads to no absurd or unfair results; exclusion of alien crewmen from the preference accorded by §203(a)(7) simply improves the chance of others whom Congress could well have deemed to be more deserving.

V.

As indicated, Chan Hing's and Lai Cho's position is that the regulations dealing with conditional entries, 8 C. F. R. §235.9, are invalid for failure to list the United States as a non-Communist or non-Communist-dominated country where an alien may apply, be examined, and be granted a conditional entry with the consequent feasibility of his de-

parture to another country from which he can enter the United States. At the very least, the plaintiffs contend, the regulations are arbitrary in listing only countries in Europe and the Middle East[4] and excluding any in the Orient as places where applicants may be examined.

The first branch of the argument is quite unpersuasive. The natural reading of §203(a)(7) is that it accorded preference to two categories of refugees, those who were abroad and were seeking entry into the United States, and those who had already been here for two years. The "conditional entry" device was designed for the first group, the procedure of making a visa available in lieu of a conditional entry was intended for the second, and the obvious *casus omissus*—refugees here for less than two years—simply did not fall within the preferential scheme. If Congress had intended that refugees within this country not qualifying under the proviso for lack of two years residence should nevertheless be entitled to obtain in the United States the same treatment as those seeking entry from abroad, it would have found some way of saying this less awkward and susceptible to misinterpretation than including the United States under the rubric of "any non-Communist or non-Communist-dominated country." Furthermore, the House and Senate Committees said that the conditional entry procedure was "not unlike the parole

[4] Cuban and other western hemisphere refugees are not affected by this since they are "special immigrants" under §101(a)(27) who are not subject to the numerical limitation of §203 by express provision of §201(a). See Gordon and Rosenfield, Immigration Law and Procedure §§2.17, 2.20 (1966).

procedure utilized during the existence of the so-called Fair Share Act (sec. 212(d)(5)) and it is intended that the procedure remain the same," the new term having been developed in order to avoid "a connotation unfavorable to the alien." H. R. Rep. No. 745 at 15, and S. Rep. No. 748 at 17, 89th Cong. 1st Sess. (1965), the latter reprinted in 1965 U. S. Code Cong. & Adm. News 3328, 3335. That statute had provided that the Attorney General "may parole into the United States, pursuant to such regulations as he may prescribe" an alien refugee-escapee who "(1) applies for parole while physically present within the limits of any country which is not Communist, Communist-dominated, or Communist-occupied . . . ," 74 Stat. 504 (1960). The regulations promulgated by the Attorney General pursuant to this grant of authority were nearly identical with those challenged by petitioners here, permitting application for parole to be made only to "the nearest office of the Service *in Europe,*" which applications were to be approved "by an officer in charge *outside the United States.*" 8 C. F. R. §212.5 (1965) (emphasis added).[5] If we would otherwise have had any doubts as to

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[5] "*Parole of aliens into the United States.* * * *

(b) *Refugee-escapees.* A separate application for parole as a refugee-escapee under section 1 of the Act of July 14, 1960, shall be executed and submitted by each applicant on Form I-590 to the officer in charge of the nearest office of the Service in Europe. . . . The approval of an application for parole under section 1 of the Act of July 14, 1960, by an officer in charge outside the United States authorizes the district director at a port of entry to parole the applicant upon arrival at such port within six months after the date of authorization. . . ." 8 C. F. R. §212.5 (1965).

the consistency of 8 C. F. R. §235.9 with congressional intent, this would resolve them.

Turning to the second branch of the argument, namely, that the regulation is invalid for failure to designate an office in the Far East, we encounter the difficulty that even if we thought the claim well-founded, we could hardly direct the Attorney General to supply the office the plaintiffs want. The only recourse open to the courts would thus appear to be to stay deportation of all Chinese refugees who seek conditional entries until such an office was established or, for those who were eligible, they met the two year test of the proviso—strong medicine, indeed. Before seriously considering any such confrontation with the executive branch, we would require far weightier evidence of arbitrary action than has been presented. A letter from the legal Adviser of the Department of State to the Assistant Attorney General in charge of the Criminal Division explains:

> "Under the Act of July 14, 1960, commonly referred to as the 'Fair Share' refugee law, the examination of refeugees who made application for parole was limited to seven countries, namely, Austria, Belgium, France, Germany, Greece, Italy and Lebanon, whose governments had consented, pursuant to an agreement reached with the Department of State, to the presence of United States immigration officers within their respective territories for the purpose of examining applicants for parole into this country as refugees, and also to the return to such country within a period of two years of

> any refugees found to be statutorily inadmissible into the United States. The Congress was aware of these arrangements when it enacted Section 203(a)(7) of Public Law 89-236, and, at the same time, repealed Sections 1, 2 and 11 of the Act of July 4, 1960. . . . Consequently, the former procedures have been continued in force to facilitate the conditional entry of refugees under Section 203(a)(7). The Secretary of State and the Attorney General have agreed, however, that if it should develop later that any changes in these procedures are desirable, they will be promptly effected upon agreement between the Department of State and the Department of Justice."

Figures for the fiscal year 1966 presented by the Special Assistant United States Attorney show that while of the 3191 aliens who were found qualified for conditional entry in the fiscal year ending June 30, 1966 only five were Chinese, the bulk of aliens adjusted to the status of permanent residents under the proviso were Chinese—3576 out of 4009—so that nearly half the aliens benefiting from the seventh category of preference have been Chinese. While it appears to be true that these were for the most part Chinese who had been admitted under the Hong Kong refugee program before enactment of the 1965 amendments, there is surely no indication that any discrimination against Chinese refugees has been practiced up to this time.

The orders of Judge Levet dismissing the complaints of Tai Mui and of Chan Hing and Lai Cho are affirmed; Woo Cheng Hwa's petition for review is denied.